

DOCKET FILE COPY ORIGINAL

RECEIVED

APR 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

Washington, D.C. 20554

.....
In the Matter of the Application of)

) MM Docket No 93-54 ✓

APR-19-93 MON 15:20

hearing proceeding designated by the *Hearing Designation Order* released March 15, 1993, by the Chief, Audio Services Division, Mass Media Bureau. A summary of said *Order* was published in the Federal Register on March 18, 1993. 58 FED. REG. 14571-05.

Petitioner respectfully submits that, as a party in interest in this proceeding, it is entitled to intervene herein pursuant to 47 C.F.R. § 1.223 (a). It is further submitted that the Guild's long history of involvement in representing the rights of listeners of WNCN(FM) uniquely qualifies the Guild to assist the Commission, through participation as a party herein in the determination of the hearing issues — both those specified in the *Hearing Designation Order* and those raised in the Guild's accompanying *Motion to Enlarge Issues*. Accordingly, intervention herein also would be warranted pursuant to 47 C.F.R. § 1.223 (b).

I. PETITIONER'S INTEREST HEREIN

Petitioner Listeners' Guild, Inc. is a not-for-profit corporation organized

[REDACTED]

under the Communications Act so as to assure that the license for WNCN(FM)'s frequency will be held by a licensee that is best fit to provide service in the public interest.

A. The Guild's Participation in Previous Proceedings.

The Guild has a long history, dating back to its formation in 1974 (under the name "WNCN Listeners' Guild, Inc."), of representing the rights of listeners of WNCN(FM) before the Commission and in the courts. It was a party to proceedings before the Commission involving both a change in WNCN's program format instituted by its then-licensee, Starr-WQIV Inc., and Starr's 1975 application for renewal of WNCN's license. The Guild participated in a 1975 settlement of those proceedings pursuant to which the license was assigned by Starr to GAF Broadcasting Company, Inc. ("GAF"), the present licensee, in June, 1976. *See Starr-WQIV, Inc.*, 59 FCC2d 257 (1976).

From 1981 through 1988, the Guild participated as *amicus curiae* in civil contract litigation in the New York courts between GAF and Concert Radio, Inc. concerning a purchase-option provision in the 1975 settlement agreement. At the same time, the Guild petitioned to deny GAF's 1981 renewal application for WNCN, asking that renewal be conditioned on GAF's compliance with any court order requiring specific performance of the option. Ultimately, although GAF was held liable in damages to Concert Radio for breaching the option, specific performance was not ordered, *Concert Radio Inc. v. GAF Corp.*, 108 A.D. 2d 273, 488 N.Y.S. 2d 696 (1985), *aff'd*, 73 N.Y. 2d 766 532 N.E. 2d 1280, 536 N.Y.S. 2d 52 (1988), and the Commission's denial of the

Guild's *Petition to Deny* was affirmed by the U.S. Court of Appeals, *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465 (D.C. Cir. 1987).¹

Still more recently, the Guild petitioned the Commission to deny a 1988 application for authority to transfer control of GAF in conjunction with a leveraged buyout of the licensee's parent, GAF Corporation, by a management group led by Samuel J. Heyman. Mr. Heyman became the majority shareholder of the licensee's parent corporation when the transaction was consummated despite the pendency of a *Petition for Reconsideration* filed by the Guild. Reconsideration was later denied by the Commission, *GAF Corp.*, 7 FCC Rcd 3225 (1992), and an appeal from that decision is now pending in the U.S. Court of Appeals, with oral argument thereon scheduled for October 14, 1993. *Listeners' Guild, Inc. v. FCC*, No. 92-1270 (D.C. Cir. filed June 25, 1992).

B. The Guild's Participation in This Renewal Proceeding.

On May 1, 1991, the Guild petitioned the Commission to deny GAF's presently pending renewal application for WNCN(FM)'s license. The Guild's *Petition to Deny* rests in part upon allegations that it had previously asserted in the transfer of control proceeding (and which thus are subject to the outcome of the pending appeal before the D.C. Circuit), as well as upon additional allegations raised for the first time in this renewal proceeding.

-
1. The Court of Appeals also affirmed the Commission's denial of the Guild's *Petition for Leave to Intervene* in a comparative hearing between GAF and Classical Radio, Inc., which in 1981 had filed a competing application. 813 F.2d at 470-71. The decision rested on the fact that in that proceeding, unlike the present one, the Guild took an entirely neutral position, neither seeking to enlarge the hearing issues nor to take any position on the comparative issue.

The *Hearing Designation Order* expressly upheld the Guild's standing as a party in interest on the basis of the May 1, 1991 affidavit of its then-President, David Malamud, which was annexed to the Guild's *Petition to Deny*. A copy of Mr. Malamud's affidavit is annexed as Exhibit A hereto. The Guild's continuing interest in this proceeding is attested to in an affidavit to like effect, sworn to April 19, 1993 by Leigh N. Harris, the Guild's present Chairman, and annexed as Exhibit B hereto.

The *Hearing Designation Order* did not address directly issues raised by the Guild concerning GAF's equal employment opportunity program and practices. Those matters were, without discussion or explanation, "referred to the Mass Media Bureau's EEO Branch for Commission disposition. Any grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations." *Hearing Designation Order*, "NOTE" to n. 1.

The *Hearing Designation Order* rejected the Guild's allegations in its *Petition to Deny* that criminal securities fraud charges against GAF Corporation, GAF's corporate parent, and James T. Sherwin, one of its principal officers, raised issues concerning GAF's basic character qualifications that warrant a hearing issue. "In *GAF Corporation*, 7 FCC Rcd 3225 (1992), the Commission definitively ruled that the reversal of the convictions of GAF Corporation and Sherwin eliminated questions about GAF's fitness to be a licensee." *Hearing Designation Order*, para. 28. However, since the Commission decision thus relied upon remains subject to appeal, this issue has not actually been finally and "definitively" resolved.

Contrary to what the *Order* implies, the Guild had *not* asked the Commission to adjudicate any rights to its or the club's name, nor to grant damages, an injunction or any other civil remedy. What the Guild had in fact alleged was that GAF had improperly used various threats and inducements in an effort to dissuade the Guild from presenting facts and arguments adverse to GAF to the Commission. It thus asked the Commission to consider

arguments before the Commission reflect adversely on GAF's fitness as a licensee. That question was never addressed in the *Hearing Designation Order*

The *Hearing Designation Order* also rejected programming-related issues raised in the Guild's *Petition to Deny*. *Hearing Designation Order*, paras. 34-37

Finally, the *Hearing Designation Order* held that the Guild's *Petition to Deny* GAF's renewal application "IS DENIED TO THE EXTENT INDICATED ABOVE. See 'Note' at footnote 1, above." *Hearing Designation Order*, para. 45. On April 14, 1993, the Guild timely filed a *Petition for Reconsideration* addressed to the Chief, Audio Services Division, Mass Media Bureau.

II. PETITIONER IS ENTITLED TO INTERVENE HEREIN PURSUANT TO 47 C.F.R. § 1.223 (a).

The Guild respectfully submits that it is a party in interest entitled to intervene herein pursuant to 47 C.F.R. § 1.223(a) for the purpose of prosecuting its *Petition to Deny* the renewal of GAF's license. Indeed, the *Hearing Designation Order* itself expressly upheld the Guild's claim to "standing as a party-in-interest." *Hearing Designation Order*, para. 30.

Furthermore, the Guild's *Petition to Deny* GAF's renewal application remains pending, except with respect to those matters as to which it was

~~denied. Hearing Designation Order, para. 45. In addition, all~~

Under 47 U.S.C. § 309 (d), unless the Commission has denied a petition to deny and has issued a "statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition," the proceeding is subject to the provisions for a hearing contained in 47 U.S.C. § 309 (e). The latter subsection confers upon any party in interest not notified by the Commission of the hearing designation to "acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for [its] interest Any hearing . . . shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate "

These statutory provisions clearly confer upon the Guild the right to full participation in the hearing designated by the *Hearing Designation Order* herein. The statutory right to participation in a "full hearing" mandates that the Guild must be permitted to participate in discovery, present direct evidence, and cross-examine adverse witnesses, not only to the extent that issues raised in its *Petition to Deny* remain pending, but also with respect to the comparative issue and GAF's claim of a renewal expectancy,

Only in the context of the *entirety* of the hearing evidence will be possible for the trier of fact to assess fully whether any misconduct or lack of compliance by GAF — whether relating to its EEO program and practices, abuse of the Commission's processes, or otherwise — is symptomatic of a broader pattern of impropriety that would reflect adversely on GAF's character qualifications. The provision in the *Hearing Designation Order* that "[a]ny grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations" thus cannot be substituted

for the Guild's right to participate in the hearing. It prejudices the central question of whether those allegations would warrant denial of the renewal application, and denies the Guild its right to adduce evidence bearing thereon through discovery and during the hearing. Only recognition of the Guild's status as a party will afford the Guild its statutory right under 47 U.S.C. § 309 (e) to a full hearing.

Finally, if the hearing issues are enlarged as prayed for in the Guild's accompanying *Motion to Enlarge Issues*, the Guild's right to intervene and to participate in the adjudication of those issues is self-evident.

**III. PETITIONER SHOULD IN ANY EVENT BE
PERMITTED TO INTERVENE HEREIN PURSUANT
TO 47 C.F.R. § 1.223 (b).**

Although, as discussed above, the Guild submits that it is entitled to intervene herein pursuant to 47 C.F.R. § 1.223 (a), it would in any event be appropriate to permit intervention pursuant to 47 C.F.R. § 1.223 (b), since the Guild's long years of involvement in proceedings before the Commission and in the courts involving GAF and WNCN(FM) both confirm its interest in the matters to be adjudicated at the hearing and make it uniquely qualified to assist the Commission, through participation as a party herein, in the determination of the hearing issues — both as specified in the *Hearing Designation Order* and as raised in the Guild's accompanying *Motion to Enlarge Issues*.

The Guild has, for a great many years, closely followed and monitored WNCN(FM)'s programming and management, as well as GAF's corporate,

financial and managerial activities, particularly insofar as they might affect WNCN(FM) or otherwise bear on GAF's fitness to hold its license. The Guild's knowledge, acquired through its monitoring as well as through various dealings with GAF over a sustained period of time, would be helpful to the trier of fact in assessing both GAF's character and the quality of its performance as a licensee. Moreover, that knowledge places the Guild at an advantage over the Commission's trial counsel and the competing applicants and their counsel in opposing whatever showing GAF may make in an attempt to secure a renewal expectancy and/or a comparative advantage over the other applicants.

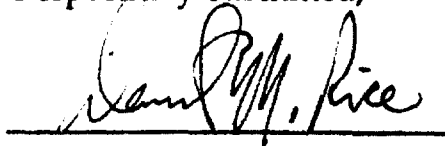
Finally, allowing the Guild to intervene herein will bring to the proceeding directly a valuable viewpoint that neither Commission staff nor competing applicants can represent fully — that of the listening audience.

CONCLUSION

In light of the foregoing, the Guild should be permitted to intervene as a party to the consolidated hearing on the above-captioned applications and to participate fully in all subsequent proceedings herein.

Dated: April 19, 1993

Respectfully submitted,



David M. Rice

One Old Country Road
Carle Place, New York 11514
(516) 747-7979

Attorney for Listeners' Guild, Inc

contributions from members and other supporters which has enabled it to maintain its office in the Carnegie Hall Building, 881 Seventh Avenue, New York, New York 10019, and to carry on its activities, focused primarily on the preservation and restoration of high-quality classical music broadcasting on

Before the
Federal Communications Commission
 Washington, D.C. 20554

.....)	
In the Matter of the Application of)	MM Docket No. 93-54
)	
GAF BROADCASTING COMPANY, INC.,)	File No.
)	BRH-910201WL
For Renewal of License of Station)	
WNCN (FM), New York, New York)	
)	
.....)	

.....)	
In the Matter of the Application of)	
)	File No.
CLASS ENTERTAINMENT AND)	BPH-910430ME
COMMUNICATIONS, L.P.)	
)	
For a Construction Permit for a New FM Station)	
on 104.3 MHz at New York, New York)	
)	
.....)	

.....)	
In the Matter of the Application of)	
)	File No.
THE FIDELIO GROUP, INC.,)	BPH-910502MQ
)	
For a Construction Permit for a New FM Station)	
on 104.3 MHz at New York, New York)	
)	
.....)	

STATE OF NEW YORK))	
:		Ss:
COUNTY OF QUEENS))	

LEIGH N. HARRIS, being duly sworn, deposes and says:

1. I am the Chairman of Listeners' Guild, Inc. ("Guild"), the Petitioner herein, and I submit this affidavit in support of the Guild's *Petition for*

EXHIBIT B

Intervention in the hearing of the above-captioned proceeding for the renewal of the license for WNCN(FM), New York, New York.

2. The Guild is a not-for-profit corporation organized and existing under the laws of the State of New York. It was organized under the name "WNCN Listeners' Guild, Inc." in 1974, in order to represent the interests of listeners in connection with a change of WNCN's classical music format. The Guild adopted its present name in 1984.

3. I and virtually all of the Guild's numerous other members, as well as all of its directors and officers, are listeners who reside in the areas of New York, New Jersey and Connecticut where the signal of station WNCN(FM) is heard. The Guild presently has between 1,500 and 2,000 paid-up members and receives contributions from several thousand additional individuals. Over its last three fiscal years it has averaged about \$30,000 in contributions from members and other supporters which has enabled it to maintain its office in the Carnegie Hall Building, 881 Seventh Avenue, New York, New York 10019, and to carry on its activities, focused primarily on the preservation and restoration of high-quality classical music broadcasting on WNCN, but also encompassing broader issues of concern to the listening public.

4. Over the entire period that GAF Broadcasting Company, Inc. has held the license for WNCN, the Guild has followed and monitored closely the station's programming and broadcast policies, as well as the managerial, corporate, financial and other activities of the station's management and ownership. The Guild is thereby uniquely qualified to assist the Commission in its task of assessing the qualifications of GAF to continue to hold the license for WNCN, as well as that of comparing its qualifications to those of the competing applicants in this proceeding.

5. No part of the assets, income or profit of the Guild is distributable to or inures to the benefit of its members, directors or officers. The Guild has no

economic or financial stake in any broadcast licensee or applicant, nor in the operation of any broadcasting station.

6. The filing of the *Petition for Intervention* and *Motion to Enlarge Issues* have been duly authorized by the Guild's Board of Directors. I am familiar with the contents thereof and to the best of my knowledge, information and belief, the allegations thereof are true and correct and that they are being submitted for the purposes stated therein.

7. I share with my fellow members, directors and officers of the Guild a strong interest in assuring that WNCN is owned and operated consistently with the public interest, convenience and necessity. To protect and further that interest, I respectfully submit that the Guild's *Petition for Intervention* should be granted in all respects.



Leigh N. Harris

Sworn to before me this
19th day of April, 1993



Notary Public

DAVID M. RICE
Notary Public, State of New York
No. 41-4962467
Qualified in Queens County
Commission Expires June 19, 1993

CERTIFICATE OF SERVICE

- 2 -

Harry F. Cole, Esq.
Bechtel & Cole
1901 L Street, N.W.
Washington, D.C. 20037

W. Jan Gay, Esq., Assistant Chief
Audio Services Division
Mass Media Bureau
1919 M Street, N.W.
Washington, D.C. 20554

A handwritten signature in cursive script, reading "David M. Rice". The signature is written in dark ink and is positioned above a horizontal line.

David M. Rice